A

KHALID MEHMOOD v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
ZABARIAH MOHD YUSOF JCA
HASNAH MOHAMMED HASHIM JCA
B [CRIMINAL APPEALS NO: B-05(M)-336-08-2017
& B-05(M)-337-08-2017]
18 OCTOBER 2019

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Appeal against conviction and sentence – Possession – Whether accused persons had custody and control of drugs – High Court Judge made finding of actual trafficking under s. 2 and invoked statutory presumption of trafficking under s. 37(da) of Dangerous Drugs Act 1952 – Whether High Court Judge invoked two different burdens to rebut – Whether serious misdirection –*
D *Whether accused persons prejudiced – Whether safe to convict accused persons*

The first and the second appellants were charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The appellants were stopped at the Kuala Lumpur International Airport ('KLIA') by a police officer ('SP4') and his team. They were taken to the narcotics office where a body search was
E conducted on both the appellants. Upon body inspection of the first appellant, SP4 felt 'objek keras' in the first appellant's shirt and found two clear packets on the right and left side of the first appellant's waist. Both packets were found to contain clear powder later confirmed to be methamphetamine. As for the second appellant, SP4 felt 'objek keras' in the
F shirt of the second appellant and found three plastic packages which had been cellotaped and slipped in front of the midsection of the stomach and on each side of the waist of the second appellant. Powdery and crystal clear substances were found in the packages suspected to be heroin and syabu. All the suspected drugs had been sent by the investigating officer, SP5, to the
G chemist for analysis. SP3, the chemist, found them to contain 702.7g heroin, 153.10g monoacetylmorphines and 390.8g methamphetamine (being the subject matter of the first and second charges against the second appellant) and 1144.8g methamphetamine (being the subject matter of the charge against the first appellant). In determining the element of knowledge to prove
H possession, the High Court Judge ('HCJ') held that it was clear that the appellants were carrying 'benda keras' which were tied at their waists and that their conduct in carrying the drugs in such manner showed that they had exclusive custody and knowledge. The HCJ was satisfied that the appellants were trafficking the drugs as defined under s. 2 of the DDA. However, the HCJ did not specify which of the acts in s. 2 he was referring to. The HCJ
I also invoked the presumption of trafficking under s. 37(da) of the DDA. The

HCJ thus found both the appellants guilty of all the charges preferred against them and sentenced both to death by hanging. Aggrieved by the said decision, both appellants appealed against the conviction and sentence. The issues that arose were whether the HCJ had erred when (i) making findings on trafficking *ie*, earlier he made a finding of actual trafficking under s. 2 of the DDA and at the same time he invoked statutory presumption of trafficking under s. 37(da) of the DA, which allegedly had prejudiced the appellants; (ii) he decided that there was no break in the chain of evidence by the prosecution and found that the prosecution had succeeded in proving a *prima facie* case; and (iii) he failed to consider the shoddy investigation by the SP5.

Held (allowing appeals)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) As far as possession of the drugs were concerned, there was overwhelming evidence that both the appellants were in custody and control of the same which were the subject matter of the charges. The inference from the surrounding circumstances indicated that both had knowledge of the drugs that they were carrying strapped to their waists. So long as the evidential chain of the drugs tendered from the time it was discovered to the time it was tendered in court were not affected, the identity of the drugs was not affected and hence it was not fatal to the charge in question. (paras 54 & 68)

(2) On the alleged shoddy investigation by SP5, namely, the failure to do any fingerprint lifting and DNA analysis on the drug exhibits, the cloth fitting photo not taken and the CCTV recording was not investigated, these so-called failures would not affect the overwhelming evidence that it was the appellants who were caught with the drugs strapped at their waists at the material time. As for the defences given by the appellants, which were a denial of any knowledge that the substances were drugs and that the substances were tied to their waist because they believed that they were prohibited medicines for which custom duties had not been paid, this court found it hard to believe. It was illogical for someone travelling to a foreign country carrying packets of substances in the manner that the appellants did without asking nor being suspicious of their contents, but merely following one Shah's orders blindly. Further, Shah was never suggested to the prosecution witnesses and the investigating officer. Therefore, the defence were mere afterthoughts and bare denials. (paras 55, 57, 64, 66 & 67)

(3) However, there was no specific finding by the HCJ that the appellants had committed any of the acts that constituted trafficking as defined under s. 2 of the DDA. The HCJ complicated the matter further when

His Lordship also invoked the presumption under s. 37(da) of the Act to make a finding of 'trafficking.' This was in addition to the application by the HCJ on the direct definition under s. 2 of the act of 'trafficking'. This was a serious misdirection by the HCJ. This method of making a finding in the alternative showed the uncertainty by the HCJ. It was not clear which burden the appellants were supposed to rebut. If the finding of trafficking was by direct evidence under s. 2, then the evidential burden on the appellants was to create a reasonable doubt on the prosecution's case. However, if the finding of trafficking was premised on the presumption under s. 37(da) of the DDA, then there was a higher burden for the appellants to rebut *ie*, on a balance of probabilities. There was no affirmative finding as to which section His Lordship was relying on. This had seriously prejudiced the appellants as they were left wondering which burden of proof they ought to undertake in order to prove their defence. The benefit of this doubt should be in favour of the appellants. (paras 49-51 & 53)

(4) It was thus unsafe to convict both the appellants for trafficking. The conviction and sentence of the appellants for trafficking were thus set aside and substituted with a conviction under s. 12(2) of the DDA punishable under s. 39A(2) of the same. (para 69)

Case(s) referred to:
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Nguyen Quoc Tuan v. PP [2016] 1 LNS 1536 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Yap Kim Wang [2016] 3 CLJ 433 CA ***(refd)***
Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP [2014] 4 CLJ 406 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(da), 39A(2), 39B(1)(a), (2)

(Criminal Appeal No: B-05(M)-336-08-2017)
For the appellant - Kharen Jit Kaur LCS; Law Chambers of Kharen Jit & Assocs
For the respondent - Samihah Rhazali; DPP

(Criminal Appeal No: B-05(M)-337-08-2017)
For the appellant - Rajpal Singh; M/s Rajpal, Firah & Vishnu
For the respondent - Samihah Rhazali; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-176-09-2013 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] Muhammad Adnan Shahzad was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) as follows:

> Bahawa kamu pada 5 Mac, jam lebih kurang 10.00 malam, di kawasan Tuntutan Bagasi H, Balai Ketibaan Antarabangsa, Aras 3, MTB KLIA, di dalam Daerah Sepang, di dalam negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu sejumlah berat 1144.8 gram Methamphetamine dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] Khalid Mehmood faced two charges under s. 39B(1)(a) of the DDA as follows:

> 1st Charge:
>
> Bahawa kamu pada 5 Mac 2013, jam lebih kurang 10.00 malam, di kawasan Tuntutan Bagasi H, Balai Ketibaan Antarabangsa, Aras 3, MTB KLIA, di dalam Daerah Sepang, di dalam negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu sejumlah berat 702.7 gram Heroin dan 153.10 gram Monoacetylmorphines dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.
>
> 2nd Charge:
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> Bahawa kamu pada 5 Mac 2013, jam lebih kurang 10.00 malam, di kawasan Tuntutan Bagasi H, Balai Ketibaan Antarabangsa, Aras 3, MTB KLIA, di dalam Daerah Sepang, di dalam negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu sejumlah berat 390.8 gram Methamphetamine dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] In this judgment, we will refer to Muhammad Adnan Shahzad as the first appellant and Khalid Mehmood as the second appellant so as to be consistent with the written submissions by both parties.

[4] At the High Court, after a full trial, the learned High Court Judge found both appellants guilty of all the charges preferred against them. Both appellants were convicted under s. 39B(2) of the DDA and sentenced both to death by hanging.

[5] Aggrieved by the decision of the learned High Court Judge, both appellants appealed against the conviction and sentence to this court, which were the appeals before us.

[6] After having considered the written and oral submissions from both parties, unanimously, we found merits in the appeals. We allowed the appeals by both of the appellants and set aside the convictions and sentences. We substituted it with a conviction under s. 12(2) of the DDA punishable under s. 39A(2) of the same. After hearing mitigation from both appellants, we passed sentences against both the appellants accordingly.

[7] Hereinbelow are our grounds for deciding so.

Background

[8] On 5 March 2013, around 10pm, Det/Sjn Zulkifli Haji Zainal (SP4), a police officer from the Narcotics Branch of the Kuala Lumpur International Airport, Sepang (KLIA), and his team were on duty at the baggage claim area at the arrival hall of the KLIA. SP4 saw two male individuals pushing their respective trolleys heading out of the baggage claim area. SP4 and his team stopped both of them at the end of carousel "S", introduced himself and asked from the two individuals to produce their passports. From the passports produced, they were identified as Muhammad Adnan Shahzad (first appellant) and Khalid Mehmood (the second appellant).

[9] As the scanner machine was not functioning at that time, both appellants were brought to the narcotics office without their luggage being scanned.

[10] At the narcotics office, a body search was conducted by SP4 on both appellants.

[11] Upon body inspection on the first appellant, SP4 said he felt "objek keras" in the first appellant's shirt. He lifted the shirt and found two clear packets with cellophane tape and tied with a white coloured cloth string, on the right and left side of the first appellant's waist (which were slipped in both sides of his pants). SP4 instructed the first appellant to pull up his shirt and take out both packets to be inspected.

[12] SP4 made a small incision on both packets and found that both packets contained clear powder, which after being tested turned out to be methamphetamine. SP4 marked the first packet as ZZ (B1) and the second packet as ZZ (B2). The court marked these two packets as P29 and P30 respectively.

[13] The first appellant's luggage was inspected and it was found to contain clothes, whilst the bag pack contained the first appellant's personal belongings.

[14] As for the second appellant, SP4 did a body inspection on him and felt "objek keras" in the shirt of the second appellant. When the shirt was lifted, SP4 found three plastic packages which had been sellotaped and slipped in front at the midsection of the stomach and on each side of the waist of the second appellant with a white coloured cloth string tied at the stomach.

[15] SP4 instructed the second appellant to take out and opened the three packages before handing it over to SP4.

[16] SP4 made an incision on all three packages to find out the contents. The second appellant had opened the wrapping on his body and handed over to SP4 the following:

(i) one plastic package which had been sellotaped with white sellotape and white cloth string contained "coklat kekuningan" powdery substance which was suspected to be heroin at the right side of his waist. This was marked by SP4 as ZZ (A1) which later was marked as P19 by the court;

(ii) one plastic packet with white sellotape and white cloth string which contained "coklat kekuningan" powdery substance which was suspected to be heroin at the mid section of his stomach. This was marked by SP4 as ZZ (A2) which later was marked as P20 by the court; and

(iii) one plastic packet with white sellotape and white cloth string which contained clear crystal substance which was suspected to be syabu at the left side of his waist. This was marked by SP4 as ZZ (A3) which later was marked as P21 by the court.

[17] SP4 had closed back the part where he had made the incision with sellotape. The part of the incision was marked as ZZ (A1), ZZ (A2) and ZZ (A3) accompanied with his signature.

[18] Subsequently, SP4 examined the contents of the trolley bag of the second appellant which bore the brand "S.V. Polo" (P10) and found few clothings. An examination on the sling bag which bore the brand "Yodata" (P11) was found to contain few clothes and magazines.

[19] SP4 had seized all the items from the first and the second appellants, weighed them and marked them for purposes of handing over to the investigating officer, SP5.

[20] SP5 in his evidence confirmed that he received the first and the second appellants from SP4 on 6 March 2013 at 1.30am as well as the exhibits as listed in the search lists P34 and P35 and the handing over lists P55 and P56 respectively.

[21] After receiving the exhibits, SP5 then marked the items which were seized from the first and the second appellants. SP5 kept the items in his locker which was locked whereby he was the only person holding the key.

[22] SP5 had sent the suspected drugs seized to the chemist (SP3) for analysis. SP3, after analysing the drug exhibits, found them to contain 702.7g heroin, 153.10g monoacetylmorphines and 390.8g methamphetamine (being the subject matter of the first and second charges against the second

appellant); and 1144.8g methamphetamine (being the subject matter of the charge against the first appellant). These drugs fall under the definition of "dangerous drugs" in s. 2 of the DDA.

The Findings Of The Learned High Court Judge

[23] In determining the element of knowledge to prove possession, the learned judge held in his grounds that it is clear that the first and the second appellants were carrying "benda keras" which were tied at their waists.

[24] Their conduct in carrying the drugs in such a manner showed that they had exclusive custody and knowledge. The learned High Court Judge found that when both appellants were requested to show their passports by SP4, they were in a state of "tergamam dan air muka mereka berubah" which showed that they had knowledge of the drugs.

[25] The learned High Court Judge was satisfied that the first and the second appellants were trafficking the drugs as defined under s. 2 of the DDA. From the grounds of judgment, the learned High Court Judge listed down all the 18 acts that are listed under the definition of "trafficking" in s. 2 of the DDA. (Refer to para. [31] of the grounds). However, the learned High Court Judge did not specify which of the acts in s. 2 he was referring to. After listing the 18 acts under the definition of "trafficking" under the DDA, the learned High Court Judge made a finding that the appellants committed the act of direct trafficking (refer to p. 20, para. [31], of the grounds).

[26] The learned High Court Judge also invoked the presumption of "trafficking" under s. 37(da) of the DDA premised on the Federal Court case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113.

[27] Hence, the learned High Court Judge found that the prosecution had proven a *prima facie* case against the first and the second appellants as per the charges preferred against both appellants. Both appellants were called to enter their defence for the offence of trafficking in drugs.

[28] Essentially, the defence of the first appellant is that, the second appellant had asked the first appellant to tie two packets of the substance to his waist while the first appellant had tied three packets to his waist to conceal from the authorities as they are prohibited medicines and to avoid from having to pay custom duties. When the first appellant exited from the terminal he was arrested and brought to the narcotics office. At the second narcotics room the first appellant saw the second appellant. The first appellant was slapped by the police officer and the police officer asked him "What is this?" whilst pointing to the two packets. The first appellant did not answer. Then the first appellant was brought to the second room and asked whether the first appellant knew the second appellant. The second appellant said that was his friend.

[29] The second appellant said that was the third time he came to Malaysia. He was promised a job by an agent by the name of "Shah" in Australia. Malaysia was supposed to be a transit place before he went to Australia. According to the second appellant, there was a third male but he did not know his name. The bags which he brought were given by the agent, to be sent to someone in Malaysia whom he does not know, as the person was supposed to contact him upon arrival. These bags were given by Shah. The smaller bag belongs to the second appellant but the red bag was never opened by the second appellant.

[30] Shah had contacted the second appellant through telephone call after the second appellant had passed the immigration counter. Shah had told the second appellant that there were medicines in the big bag which the second appellant was carrying and that the second appellant has to conceal these medicines as they were prohibited medicines in Malaysia. Shah told the second appellant to tie the packets of medicine on his body and it was crucial that it be hidden or else it would be confiscated by the Malaysian authorities. In the toilet, the second appellant had informed the first appellant of his conversation with Shah. Shah had instructed the first appellant to do the same with the other two packets of the medicines.

[31] In the toilet, the second appellant had tied the packets to his waist and that of the first appellant's. The first appellant went out of the toilet separately from the second appellant. When the second appellant came out he was arrested and the police told him to follow him (the police) to the examination room.

[32] The second appellant said that he could not understand the English language and asked that an Urdu interpreter be supplied but his request was denied. At first, they communicated in Bahasa Melayu and he was beaten when he could not comprehend what was said to him. The second appellant said that he informed them of Shah and also told the police that the packets contained medicines for which no custom duty was paid. The second appellant asserted that he had no knowledge that the packets contained drugs.

[33] At the end of the defence case, the learned High Court Judge found that it was not possible for the appellants not to know that the contents of the plastic packets were drugs. The manner in carrying the drugs in a concealed way at their waists indicated that they had the knowledge.

[34] The learned High Court Judge found that the existence of Shah was not made out and that the defence of the appellants were mere afterthoughts. The learned High Court Judge also took into account their demeanour when giving evidence and found that they were not credible witnesses.

[35] The learned High Court Judge further said in his grounds that:

> [54] ...
>
> I. ISU-ISU YANG PERLU DI PUTUSKAN DI AKHIR KES PEMBELAAN
>
> 54.1 Sama ada Tertuduh-Tertuduh dapat menimbulkan suatu keraguan yang munasabah ke atas Kes Pendakwaan?
>
> 54.2 Sama ada Tertuduh-Tertuduh dapat mematahkan anggapan di bawah Seksyen 37 (da) Akta Dadah Berbahaya 1952?; dan
>
> 54.3 Sama ada Pendakwaan dapat membuktikan kesnya melampaui keraguan yang munasabah?
>
> J. DAPATAN MAHKAMAH
>
> 55. Mengenai isu 1, Mahkamah berpendapat Pembelaan Tertuduh 1 dan Tertuduh 2 gagal menimbulkan suatu keraguan yang munasabah ke atas kes Pendakwaan. Pembelaan Tertuduh 1 adalah penafian kosong dan "afterthought". Penafian bukan suatu Pembelaan ...
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> 56. Mengenai isu kedua, atas imbangan keberangkalian Mahkamah berpandangan kedua-dua Tertuduh gagal mematahkan anggapan di bawah Seksyen 37(da) Akta Dadah Berbahaya 1952; dan
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> 57. Mengenai isu ketiga, selepas meneliti keterangan Kes Pendakwaan dan keterangan Pembelaan, Mahkamah berpandangan bahawa Pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah (Seksyen 182A(1) Kanun Tatacara Jenayah).
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> 58. Oleh itu, Mahkamah memutuskan Kedua-dua Tertuduh bersalah atas pertuduhan-pertudduhan yang dikenakan ke atas mereka. Kedua-dua Tertuduh disabitkan (Seksyen 182A (2) Kanun Tatacara Jenayah).

The Appeal

Submission By The Appellants

[36] Counsel for the first appellant raised four issues in his submission. The first issue is that the learned High Court Judge had erred when His Lordship had invoked two different burdens at the end of the prosecution's case.

[37] The learned High Court Judge erred when making findings on trafficking. Earlier, he made a finding of actual trafficking under s. 2 of the DDA. At the same time, he invoked the statutory presumption of trafficking under s. 37(da) of the DDA against the appellant. This, according to the appellant, had prejudiced the appellant as His Lordship had placed a higher burden on the first appellant. Therefore, the learned High Court Judge had misdirected himself on the law. The first appellant was left in doubt as to whether the burden of proof imposed on him was to raise the reasonable doubt or to rebut the statutory presumption on a balance of probabilities on the issue of trafficking.

[38] Further misdirection occurred when His Lordship imposed both burdens on the first appellant at the end of the defence stage when he said in his judgment:

> 55. Mengenai isu 1, Mahkamah berpendapat Pembelaan Tertuduh 1 dan tertuduh 2 telah gagal menimbulkan satu keraguan yang munasabah ke atas kes pendakwaan., …
>
> 56. Mengenai isu kedua, atas imbangan keberangkalian, mahkamah berpandangan bahawa kedua-dua tertuduh gagal mematahkan anggapan di bawah seksyen 37(da) Akta dadah Berbahaya 1952.

[39] It was submitted by the first appellant that there is a serious misdirection in the judgment made by the learned High Court Judge which warrants appellate intervention by this court.

[40] Secondly, the learned High Court Judge erred when he decided that there was no break in the chain of evidence by the prosecution and found that the prosecution has succeeded in proving a *prima facie* case.

[41] In addition, the learned High Court Judge also erred when calling for defence when the prosecution witnesses were not credible. It was submitted that the arresting officer (SP4) was not a credible witness. Counsel for the first appellant alleged that there were two different versions of the evidence by SP4 in court. What is stated in exh. P54 (RA vol. 3 at p. 52) and what was said by SP4 in open court appeared to be contradicting. In P54, SP4 states:

> Kemudian saya telah mengarahkan penama untuk menyelak bajunya dan telah menjumpai (2) bungkusan plastic lut sinar bersalotepe putih yang diselitkan pada seluar dibahagian sebelah kanan dan kiri pinggangnya yang di dalamnya mengandungi serbuk kristal jernih disyaki dadah syabu dan ditandakan ZZ (B1) dan ZZ (B2).

The oral evidence of SP4 said the following:

> Pemeriksaan Utama SP4:
>
> Setelah diselak didapati 2 bungkusan plastic lutsinar yang ber salotape yang diikat dengan tali kain warna putih pada badan. Saya arahkan subjek supaya membuka dan mengeluarkan 2 bungkusan tersebut untuk saya periksa.
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> Pemeriksaan balas SP4:
>
> Q: Untuk Tertuduh 1 (Muhammad Adnam Shahzad), bungkusan bertali atau tidak?
>
> J: Bungkusan tidak bertali.

It was submitted by the first appellant that the issue of how the packets were placed on the first appellant's body (whether it was tied using a white cloth or not) is a very crucial issue, which had been overlooked by the learned High Court Judge.

[42] SP4 was the one who found the drugs, hence it is crucial for him to give a consistent stand as to how the drugs were found. The fact that he gave two different versions raised the question of identity of the drug exhibits tendered in this case. If the drugs were found tied with a white cloth, and the white cloth was never tendered in court, then it would raise a doubt on whether the drugs brought to and tendered in court were in fact the same drugs which were alleged to be found on the first appellant. The learned High Court Judge relied on the evidence of SP4 as to how the drugs were found as can be seen from para. [11] of the grounds of judgment:

> 11. Kemudian, SP4 membuat pemeriksaan ke atas T1 Muhammad Adnan Shahzat. SP4 mendapati ada objek keras pada baju yang dipakai oleh T1. SP4 menyelak baju T 1 dan mendapati 2 bungkusan plastik lutsinar yang bersalotape dan diikat dengan tali kain warna putih pada badan T1. SP4 mengarahkan T1 membuka dan mengeluarkan 2 bungkusan tersebut untuk diperiksa.

[43] Thirdly, the learned High Court Judge also erred when he failed to consider the shoddy investigation by the investigation officer, SP5. It was the contention of the first appellant that SP5 failed to do the following:

(i) failure to do fingerprinting lifting test and DNA analysis on the drugs exhibits:

It was submitted that the defence of the first appellant that the second appellant gave him the two packets when both of them were in the toilet at KLIA. If the fingerprinting lifting test and the DNA analysis were done on the drug exhibits, the results might show that there was a mixture of DNA of the first and the second appellants. It was also possible that the fingerprint lifting test would show the existence of the second appellant's fingerprint on the packets. All these would support the defence of the first appellant that the packets were given to him by the second appellant and the failure of SP5 to carry out such tests deprived the first appellant of his right to prove his defence.

(ii) The cloth fitting photo was not taken:

It was in evidence by SP5 that the first appellant was wearing a t-shirt, with a jacket and also a pair of jeans. Counsel for the first appellant submitted that the physical size of the packet was quite big, which was to be placed on the waist, would be obvious to the eyes, especially when someone was wearing a t-shirt. The first appellant was alleged to have carried two packets with him on his body, which, if the prosecution's version is true, the bump on the first appellant's waist where he put the packets, could be clearly seen. Counsel for the first appellant submitted that it was crucial for SP5 to produce the photograph of the first appellant wearing the clothes he wore when he was arrested, to strengthen the prosecution's version, which SP5 failed to do.

(iii) The CCTV recording was not investigated:

It was crucial for SP5 to obtain and investigate the CCTV recording because the contention of the first appellant was that he went to the toilet with the second appellant after they collected their bags from the carousel. The CCTV recording, if produced in court, might show that the first appellant was telling the truth. The CCTV recording would also support the first appellant's version of defence. The failure of SP5 to investigate the CCTV recording deprived the first appellant's right for the best evidence and also prejudiced the defence of the first appellant.

[44] The learned High Court Judge also erred when he said that the appellant's defence was not credible and merely a bare denial and an afterthought. The first appellant submitted that he did offer a defence, that he was asked by the second appellant to put the packets in his pants after they landed in Malaysia was credible. The first appellant contended that in an attempt to slide in the packets after being asked by the second appellant, had caused damage to both his pants and his belt. This was supported by SP5 in his evidence.

[45] The defence of the first appellant tallied with his cautioned statement at D61 which was tendered in court. The defence of the first appellant should not have been brushed aside by the learned High Court Judge as he had informed the police the truth during investigation. In addition, the defence's version that he went to the toilet with the second appellant was supported by SP4, the raiding officer. Hence it was submitted that the first appellant's version that he was asked by the second appellant to put the packets in his pants after they landed in Malaysia was credible. The first appellant contended that in an attempt to slide in the packets after being asked by the second appellant had caused damage to both his pants and belt, which was supported by the evidence of SP5. Therefore, the learned High Court Judge ought to have considered the defence version as not an afterthought nor a bare denial but a credible defence. Therefore, the learned High Court Judge had made a wrong finding by stating, at paras. [51] and [53] in his grounds, that the defence was a mere afterthought and bare denial.

[46] Therefore, the learned High Court Judge had erred in calling for the defence of the first appellant.

[47] As for the second appellant, on the issue of possession, it was submitted that the second appellant did not know that the substances that were tied at his waist at the material time were drugs. He was told by one by the name of "Shah" that the substances were "medicine" for men and it was hidden to avoid paying for custom duties. The second appellant only knew that they were drugs after being told by SP4 when he was detained. SP4 and SP5 failed to investigate "Shah".

A

Our Findings

[48] On the issue of possession, the learned High Court Judge had made a finding of custody and control on the part of the appellants from the manner the drugs were carried into the country and the conduct of the appellants when passports were asked for by SP4 where they were said to be "tergamam
B dan air muka berubah" indicating an act of panic. The learned High Court Judge at para. [30] of the grounds found that at the time of arrest, the appellants were carrying "benda keras" which turned out later to be drugs. These drugs were tied at their respective waists under their shirts. The manner of bringing in the drugs was obviously to avoid detection from the
C authorities. This attempt to conceal by tying the drugs to the waist under the shirts by the appellants, strongly point to knowledge on the part of the appellants. From these evidence, the finding was that the appellants had exclusive custody and control of the drugs at the material time.

[49] At the close of the prosecution's case, the learned High Court Judge
D had relied on the definition of trafficking under s. 2 of the DDA to make a finding on "trafficking" against the two appellants. There was no specific finding by the learned High Court Judge that the appellants had committed any of the acts that constituted trafficking as defined under s. 2 of the DDA. Hence, if the learned High Court Judge had relied on the actual trafficking
E under s. 2 of the DDA in finding a *prima facie* case against the appellants, then clearly the learned High Court Judge had erred when His Lordship in his grounds at para. [56] stated that the appellants had failed to rebut the presumption under s. 37(da) of the DDA on a balance of probabilities.

[50] However, the learned High Court Judge complicated the matter
F further when His Lordship also invoked the presumption under s. 37(da) of the Act to make a finding of "trafficking". This was in addition to the application by the learned High Court Judge on the direct definition under s. 2 of the Act of "trafficking".

[51] Clearly, the learned High Court Judge was confused and this is a
G serious misdirection by the learned High Court Judge. This method of making a finding in the alternative shows the uncertainty by the learned High Court Judge. This is prejudicial to the appellants as it was not clear which burden the appellants were supposed to rebut. If the finding of trafficking is by direct evidence under s. 2, then the evidential burden on the appellants
H is to create a reasonable doubt on the prosecution's case. However, if the finding of trafficking is premised on the presumption under s. 37(da) of the DDA, then there is a higher burden for the appellants to rebut, ie, on a balance of probabilities.

I

[52] In *Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP* [2014] 4 CLJ 406 the learned High Court Judge had invoked the double presumptions against the appellant but failed to indicate which presumption that he relied on. It was held by this court that:

> [21] In our view, the approach of not electing or making a finding on which presumption that was invoked but by merely relying on the alternative, is most undesirable. It reflects the uncertainty on the part of the trial Judge to make a finding. The trial Judge ought to make the necessary finding i.e. whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before her. We are further of the view that it is important that such a finding be made as it impacts the burden placed on the defence.

The above holding is consistent with the explanation given by Augustine Paul J as to the different burden of proof that is required if the findings are based on actual direct evidence as against based on presumptions under the law in *PP v. Chia Leong Foo* [2000] 4 CLJ 649, HC wherein His Lordship held, at p. 668, paras. h – i, p. 669 paras. a – c, that:

> ... It must first be observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused. This is because where the court relies on a statutory provision relating to a presumption of law like the presumption provisions it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it (see *PP v. Yuvaraj* [1969] 2 MLJ 89; *Nagappan Kuppusamy v. PP* [1988] 2 MLJ 53). This results in a legal burden being imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State v. Mello & Anor* [1999] 1 LRC 215). However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only evidential burden on an accused person to raise a reasonable doubt. This indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed ...

Further in *Nguyen Quoc Tuan v. PP* [2016] 1 LNS 1536; [2016] 6 MLJ 156, this court had the occasion to decide on a similar issue:

> [26] ... once a trial judge had made a finding of actual possession or trafficking, he cannot invoke the presumption either under s. 37(d) or (da) of the Act and *vice versa*.
>
> [27] It is therefore pertinent to scrutinise the judgment of the learned trial judge to ascertain his finding on possession, namely whether he had made a finding of actual or *mens rea* possession or whether he had invoked presumed possession under s. 37(d) of the Act or whether he had relied on both *mens rea* and presumed possession.

A ...

> [32] The finding of the learned trial judge in paras 18 and 34 of his grounds of judgment made it apparent that he had also invoked, *albeit* in the alternative, presumed possession under s. 37(d) of the Act. This approach, with respect, offended the principle of law that he ought not to rely on the alternative but to make an affirmative finding of *mens rea* possession or presumed possession of the dangerous drugs (see *Seyedalireza; Ugonna Philip Nwankwo v. PP* [2016] 4 MLJ 244 ;[2016] 2 CLJ 247).
>
> [33] In the circumstances, we found merits in the submission of learned counsel on the first issue that the learned trial Judge had misdirected himself in finding that there was *mens rea* possession and in invoking the presumptions of possession under s. 37(d) of the Act at the same time.

[53] Coming back to our present case, the manner in which the learned High Court Judge made his findings on trafficking left us in doubt as to whether the learned High Court Judge was relying on s. 2 or s. 37(da) of the DDA as proof of trafficking. There was no affirmative finding as to which section His Lordship was relying on. This had seriously prejudiced the appellants as they were left wondering which burden of proof they ought to undertake in order to prove their defence. The benefit of this doubt should be in favour of the appellants.

[54] On the issue of the credibility of SP4 whereby he gave two different versions of how the drugs were found, we found that it was not fatal to the prosecution's case. Ultimately, it is not disputed that the drugs were found tied to the waist of each of the appellants. Whether the drugs were "diselitkan pada seluar sebelah kanan dan kiri pinggang" or "diikat dengan tali kain warna putih pada badan", the overwhelming evidence was that the drugs were found on the body of the appellants, concealed from sight under each shirt. Here we were not concerned with the white cloth string, but the drugs in question. So long as the evidential chain of the drugs tendered from the time it was discovered to the time it was tendered in court were not affected, the identity of the drugs was not affected and hence it was not fatal to the charge in question.

[55] On the alleged shoddy investigation by the investigation officer, SP5, namely, the failure to do any fingerprint lifting and DNA analysis on the drug exhibits, the cloth fitting photo not taken and the CCTV recording was not investigated, these so-called failures to our minds would not affect the overwhelming evidence that it was the appellants who were caught with the drugs strapped at their waists at the material time. Similarly, the CCTV recording which showed both appellants went to the toilet, would not absolve the appellants of the charges of possession of the drugs. The case of

PP v. Yap Kim Wang [2016] 3 CLJ 433 at p. 442 para. 8 (a) which was cited and quoted by the appellants' counsel is a dissenting judgment. In addition, the facts there need to be distinguished from the facts in our present case. In *PP v. Yap Kim Wang*, it concerned drugs which were found at a premise which was accessible to others, which has a bearing on the care and custody issue. Unlike the facts in our case, where the drugs were found tied at the waist of the respective appellants. Hence, custody and control of the drugs is not an issue here.

[56] Counsel for the appellants submitted that the learned High Court Judge erred when he found that the defence was a bare denial and an afterthought.

[57] The defence of the first appellant was a denial of any knowledge that the substances were drugs and he believed that the substance that were tied at his waist were prohibited medicines for which custom duties had not been paid. That was the reason why it was concealed in such a manner. However, this was never informed to the narcotics officer when he was detained at that material time. In fact, he kept quiet when asked by SP4. Although it was in evidence that he showed by hand gesture pointing towards the second appellant and said "he gave to me" however this was denied by SP4. The evidence of SP4 was that, the first appellant did not say anything when he was asked as to the contents of the packets. In fact, when the first appellant was asked by Corporal Kenneth Khanna, the first appellant kept quiet. Corporal Kenneth Khanna was offered to the defence but was never called by the defence.

[58] The first appellant in his evidence also alleged that:

(i) he was slapped the minute he entered the narcotics office;

(ii) he was examined separately from the second appellant which was inconsistent with the evidence of SP4 who said in evidence that the first appellant and the second appellant were examined at the same place together; and

(iii) he came to Malaysia in search of a job opportunity and he was offered a job by the second appellant to repair fridges and air conditioners.

The aforesaid facts were never put forth by the defence at the prosecution's case. It is trite law that failure to put forth defence at the earliest opportunity would render such defence as afterthoughts and of recent invention, which is incapable of being accorded any weight nor consideration. Such evidence deprived the prosecution's witnesses the opportunity to rebut or explain. This is prejudicial to the prosecution's case.

[59] The first appellant said in his defence that he wanted to work in Malaysia permanently. However, there was evidence of a return ticket P49 to Pakistan. When it was suggested to the first appellant that this was not true due to the return ticket, he disagreed.

[60] In addition, the first appellant agreed that his knowledge of the contents of the packets that it was a prohibited medicine for men was what was told by the agent to the second appellant. This was also never put to the prosecution witnesses at the prosecution's stage.

[61] Given the aforesaid, the learned High Court Judge did not err when he found that the defence were mere afterthoughts.

[62] It was also the findings of the learned High Court Judge that the defence were in the nature of a denial and not reasonable. The defence of the second appellant was that he came to Malaysia together with the first appellant and a third male. This fact of the presence of a third male was also never suggested to the prosecution's witnesses. All along it was only the first and the second appellants who came to Malaysia and was arrested at the KLIA airport at the material time. The first appellant, however, insisted in his defence that he did inform the police, but the fact remained that SP4 never said anything about the presence of this third male nor was he asked in cross-examination as to the same.

[63] The reason given by the second appellant that an agent by the name of "Shah" who was in Pakistan told him through telephone that the contents of the packets were prohibited medicines for men was because custom duties had not been paid and hence had to be concealed by the second appellant. If it was true that the packets contained substances as such, surely that would have been told to the police the minute he was arrested by the police. However, both the appellants did not say much when asked by Corporal Kenneth Khanna in English.

[64] The defence of the appellants was hard to believe. For someone to travel across the globe with substance tied to their waists to conceal from the authorities, surely they would be curious as to what those substances were. The fact the substances were concealed from authorities would straight away suggests that they were something which were against the law. It is illogical for someone travelling to a foreign country carrying packets of substances in the manner that the appellants did without asking nor being suspicious of their contents, but merely following "Shah's" orders blindly, on the basis of trust. In addition, the second appellant did not know the full name of Shah. There was evidence that there was ample time for the second appellant to check the contents of the packets before taking the flight to Malaysia. In fact, both the appellants took a long time to exit the terminal compared to the other passengers on the flight. This fortified the evidence that the appellants had knowledge of the contents of the packets.

[65] The second appellant said in evidence that "Shah" had promised him work and it was Shah who also arranged for the tickets for the first and the second appellants. The second appellant said that he was in Malaysia as he

was in transit to Australia because he already had a job offer in Australia. But there was no document to prove that he had the job offer in Australia. There was, however, a return flight to Lahore, Pakistan. This is clearly inconsistent with his evidence of going to Australia after transit in Malaysia.

[66] Finally "Shah" was never suggested to the prosecution witnesses and the investigating officer. Neither, "Shah" nor his particulars were informed to SP5. In fact, the evidence of SP5 showed that the first appellant informed him that the two packets which were found on the first appellant were given by the second appellant at KLIA. But when SP5 asked the same from the second appellant, the first appellant merely kept quiet although being asked few times (refer RA vol 2(1) p. 72).

[67] Therefore, from the aforesaid, we found that the learned High Court Judge did not err when he said that the defence were mere afterthoughts and bare denials.

Conclusion

[68] Given the aforesaid, we unanimously found that as far as possession of the drugs was concerned, there were overwhelming evidence that both the appellants were in custody and control of the same which were the subject matter of the charges. The inference from the surrounding circumstances indicated that both had knowledge of the drugs that they were carrying strapped to their waists.

[69] However, it is our view that the learned High Court Judge had erred when he made his findings on trafficking, as we were unsure as to whether the finding was based on actual trafficking pursuant to the definition of "trafficking" under s. 2 of the DDA or presumed trafficking under s. 37(da) of the same. Due to this doubt, the benefit of which ought to be given to the appellants, we found it unsafe to convict both the appellants for trafficking. But there were overwhelming evidence against both the appellants on possession. Hence we unanimously:

(i) allowed the appeal by the first appellant and set aside the conviction and sentence by the learned High Court Judge and substituted it with a conviction under s. 12(2) DDA punishable under s. 39A(2) of the same; and

(ii) allowed the appeal by the second appellant and set aside the conviction and sentence by the learned High Court Judge for both charges and substituted it with conviction under s. 12(2) DDA punishable under s. 39A(2) of the same.

[70] After hearing arguments on mitigation from both parties and having considered the trend of sentencing in like cases, we imposed the following sentences on the two appellants:

(i) for the first appellant, we sentenced him to 18 years imprisonment from the date of arrest and imposed ten strokes of whipping; and

(ii) for the second appellant, as he played a greater role in the offences, we sentenced him as follows:

(a) for the first charge: sentence of 20 years imprisonment from the date of arrest and ten strokes of whipping; and

(b) for the second charge: sentence of 20 years imprisonment from the date of arrest and ten strokes of whipping,

both of the imprisonment sentences are to run concurrently.